UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORTHWESTERN UNIVERSITY,	)	
	)	
Employer,	)	
	)	
and	)	Case No. 13-RC-121359
	)	
COLLEGE ATHLETES PLAYERS ASSOCIATION (CAPA),	)	
	)	
Petitioner.	)	

***AMICUS CURIE* BRIEF**
IN SUPPORT OF DECISION AND DIRECTION OF ELECTION

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[1] The opinions and recommendations presented in this brief are those of the author and do not represent a position of the University of Wisconsin.

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STATEMENT OF THE CASE

On or about January 28, 2014, the College Athletes Players Association ("CAPA"), filed a Petition to represent grant-in-aid football players who play football for Northwestern University in exchange for full athletic scholarships. The Players receive "athletic aid" scholarships, covering tuition, room, board, fees, and books at Northwestern University (Jt. Ex. 27). Region 13 of the National Labor Relations Board held a six-day hearing in February 2014. On March 9, 2014, the Regional Director issued his Decision and Direction of Election, finding that grant-in-aid scholarship football players are "employees" under Section 2(3) of the Act, and directing an election in such unit. The Employer filed a Request to Review with the Board, which Petitioner, CAPA, opposed. On April 24, 2014, the Board granted the Employer's Request to Review, and invited interested *amicus* to file briefs. On June 4, 2014, the Board extended the deadline for amicus briefs to July 3, 2014.

INTRODUCTION

A growing concern over the years relating to development of the law under the NLRA has been a steady decline of coverage under the Act.[2] Of, course, by ruling that more and employees are not covered by the Act, such as temporary employees, disabled individuals, actors' models, newspaper carrier haulers, and employees not previously considered supervisors, the Board has provided less protections to a greater number of workers in an ever demanding economy.[3] In the pending case, the Board has the

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[2] *See, e.g.,* Bill Luyre, *On the Legitimacy of Mathematical Evaluation of NLRB Decision Making,* 26 ABA Journal of Labor and Employment Law, 427 (2011), Wilma Liebman, *Decline and Disenchanted Reflections of the Aging of the NLRB*, 28 Berkley J. Employment and Labor Law 569 (2007).

[3] *See Id., Oakwood Care Center, 343 NLRB 659 (2004), Brevard Achievement Center,* 342 NLRB 982 (2004), *Pa. Acad. Of Fine Arts,* 343 NLRB 846 (2004), *St. Joseph News-Press,*

opportunity to ensure continued coverage under the Act by individuals who provide services that greatly benefit their employer and university, recognizing the right of those receiving compensation for services to come together for mutual aid and protection, and receive the additional protections of the Act.

In brief summary, this case involves the attempt by grant-in-aid football scholarship recipients to join together for mutual aid and protection under the Act, seeking to bargain over the terms and conditions in which they provide their services (Decision and Direction of Election, March 26, 2014). These grant-in-aid football players receive approximately $61,000 paid toward their tuition, fees and books, and a stipend towards room and board. In exchange, these players train for approximately 40-50 hours per week during training camp, train at least 20-25 hours a week during the academic year, and put in extra hours on drills and watching films, coordinated by a student athletic trainer. The travel and performance required for participation in the football games is also extensive. In addition to the hours of training and playing, players are subject to a myriad of rules regarding their conduct. As a result of these efforts, the Employer reported $30.1 million in revenue during the 2012-13 school year. Some of this revenue is applied to subsidizing non-revenue generating sports. (Decision and Direction of Election, March 26, 2014).

The College Athletes Players Association ("CAPA"), filed a Petition for Election to represent the grant-in-aid scholarship recipients. I leave it to the parties to address any disputes regarding the Regional Director's finding of fact, focusing below on the legal questions posed by the Board's Notice of Invitation to File Briefs.

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345 NLRB No. 31 (2005), *Oakwood Healthcare, Inc.,* 348 No. 37 (2006), *NLRB v. Kentucky River Community Care, Inc.,* 532 U.S. 706 (2001).

ARGUMENT

I. The Act's Definition of "Employee" is to be Liberally Construed, Allowing for Broad Coverage under the Act.

Traditionally, in determining whether particular employees are covered by the Act, the National Labor Relations Board has construed the National Labor Relations Act broadly to allow for coverage under the Act. *See, e.g., Town & Country Electric,* 516 U.S. 85, 94 (1995)(union organizers may be also be employees under the Act), *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-86 (1941)(job applicants are employees under the Act), *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) (NLRA created a system for organization of labor with emphasis on collective bargaining). The Supreme Court recognized that a broad interpretation of the word "employee" is consistent with several of the Act's purposes, including protection of the right to organization for mutual aid and protection and the encouragement and protection of the collective bargaining process. *See Town & Country*, 516 U.S. at 94.

Indeed, the statutory language itself calls for a broad interpretation, stating that an employee is an employee under the Act unless a "subchapter explicitly states otherwise." 29 U.S.C. § 152(3). The Board in *Boston Medical Center,* which remains good law despite comparisons to *Brown University,*[4] recognized that it was obligated to interpret the definition of "employee" broadly, providing employees coverage of the Act except where it explicitly states otherwise. 330 NLRB 152 at 159-60 (1999) (finding medical residents and interns to be employees). Indeed, the NLRB in *Boston Medical Center* aptly observed that "the breadth of § 2(3)'s definition is striking." Accordingly, in applying the statutory definition of "employee" to the instant case, the Board should continue to interpret the

[4] *See St. Barnabas Hospital*, 355 NLRB 233 (2010).

statute broadly, and continue to utilize the common law definition of an employee as a person "who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment." *See Northwestern University and CAPA,* 13-RC-121359, at 13 (RD Decision and Direction of Election, March 26, 2011)(citations omitted); *see also Town & Country*, 516 U.S. at 94.

II. The Board Should Apply The Common Law Agency Test of Master / Servant in Determining an Employee's Status Under the Act.

A. Board Precedent Supports the Use of the Common Law Test to Determine Employee Status.

As stated by the Regional Director, the Supreme Court and the Board have long utilized the common law definition of "employee," in determining whether an individual is an employee under the Act. *NLRB v. Town & Country Electric*, 516 U.S. 85, 94 (1995), *NLRB v. United Ins. Co.,* 390 U.S. 254, 258 (1968), *Lancaster Symphony Orchestra*, 357 NLRB No. 152, 192 LRRM 1105 (2011), *Az. Republic*, 349 NLRB 1040 (2007), *BKN, Inc.,* 333 NLRB 143, 144 (2001), *Seattle Opera v. NLRB*, 292 F.3d 757, 761-62 (D.C. Cir. 2002), *Roadway Package Systems, Inc.,* 326 NLRB 842, 843-50 (1988), *Royal Palm Dinner Theatre*, 275 NLRB 677, 682 (1985).

Such use of the common law test is appropriate. When Congress uses the word "employee" without further definition, Congress intends to incorporate the "conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992)(definition of employee under ERISA), *Community for Creative Non-Violence v. Reid*, 730 U.S. 739-740)(1989)(copyright context), *Town and Country*, 516 U.S. at 88-94 (NLRA), *Salamon v. Our Lady of Victory Hosp.,* 514 F.3d 217 (2d Cir. 2008)(common law agency test applied in Title VII context). The common

law definition of an employee is an individual who performs services for another under a contract for hire, subject to the other's control or right of control, and in return for payment. *Town & Country,* 516 U.S. at 94*, Seattle Opera,* 292 F.3d at 761-62, RESTATEMENT (SECOND) OF AGENCY § 2(2)(1958) (an employee is "an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the services is controlled or is subject to the right to control by the master"). Indeed, the D.C. Circuit Court of Appeals found in *Seattle Opera* that the single fact of remuneration distinguished the case from *WBAI Pacifica,* in which the Board did not find radio station volunteers to be employees. 292 F.3d at 762 n. 4, *distinguishing WBAI Pacifica,* 328 NLRB No. 179 (1999). With this same understanding, the Board has long held that the common law agency test is the appropriate standard for determining employee status under the Act. *See, e.g., NLRB v. Hearst Publications,* 322 U.S. 111 (1944), *BKN, Inc.,* 333 NRLB at 144, *Boston Medical Center,* 330 NLRB at 159-60, *Roadway Package System, Inc.,* 326 NLRB at 849 (Board recognizing test of common law of agency is standard to measure employee status, and Board lacks authority to change it).

Northwestern implies that the Board cannot consider any non-academic cases, because it has previously warned again a "blind" application of NLRA principles in the educational setting. (Northwestern Request to Review, *citing NLRB v. Yeshiva University,* 444 U.S. 672, 680-81 (1980)). Yet the Court in Yeshiva did not seek or require special rules in academia, but rather emphasized the need to examine the entire working relationship, which the common law test of agency facilitates. *See Yeshiva,* 444 U.S. at 686. In Yeshiva, the "controlling consideration was the exercise of authority that in other contexts" would undoubtedly be considered managerial. *Id.* In fact, the Board recognizes nuances within

academia, from one university to the next, and has upheld the right to organize, considering all aspects of the relationship to determine whether individuals are employees under the Act and the appropriate bargaining unit. *See, e.g., Syracuse University*, 204 NLRB 641 (1973). Using the common law test for employee status does the opposite of "blindly" applying the NLRA in academia: it requires a consideration of the entire relationship between potential employer and employee to determine whether the individual is protected by the Act.

Indeed, in applying the common law test of agency, the Board has stated that there is no one factor that is decisive, but that the total factual context be assessed in light of the pertinent common-law principles. General Counsel Memorandum, 2013 NLRB GCM LEXIS 23 (February 28, 2013), *Roadway Package System, Inc.,* 326 NLRB at 849. Factors may include the right to control, whether the individual takes any entrepreneurial risk, who supplies tools and materials, and whether there is financial or other compensation, yet there is no one decisive factor. *Lancaster Symphony Orchestra*, 357 NLRB No. 152, *Seattle Opera*, 292 F.3d at 761-62. *See also Kemether v. Pennsylvania Interscholastic Ath.* Ass'n, 1999 U.S. Dist. LEXIS 17326 (E.D. Pa. 1999)(Title VII context). Where the employer controls the manner and means by which a desired result is accomplished, the persons providing the service are likely to be employees. *See Royal Palm Dinner Theatre*, 275 NLRB 677, 680 (1985). The Common Law test simply considers examination of every aspect of the employment relationship. GCM, 2013 GCM LEXIS 23 at * 8-9, *Lancaster Symphony,* 192 LRRM 1105 at * 17 (it is exactly the ongoing control of the manner and means of performance exercised by the music director here that serves to distinguish case from others involving musicians not covered by the Act). The test is not a matter of tallying

factors, but examining the relationship. *Sweiger v. Farm Bureau Ins. Co., of NE,* 207 F.3d 480, 487 (8th Cir. 2000)(Title VII context). The D.C. Circuit Court of Appeals has stated that the Board can reasonably conclude that various indicia of employee status, like compensation and the right of control, outweigh factors suggesting otherwise, such as tax treatment. *Seattle Opera,* 292 F.3d at 762-63. Accordingly, the Board should continue to apply the common law test for employee status, considering all aspects of the relationship between the grant-in-aid scholarship employees and the employer.

B. Statutory Interpretation of the Title VII definition of Employee Likewise Supports the Use of the Common Law Test to Determine Employee Status.

1. Relevance of Title VII Anti-Discrimination Provisions.

In its Notice and Invitation for Briefs, the Board requested positions on the extent to which the non-discrimination provisions of Title VII of the Civil Rights Act of the 1964 ("Title VII") in comparison to the antidiscrimination provisions of Title IX of the Education Amendments Act of 1972 ("Title IX") are relevant to whether grant-in-aid scholarship football players are "employees" under the Act. (Notice and Invitation to file Briefs, May 12, 2014). While the Board is empowered to interpret the Act, it has on occasion, considered statutory interpretation of other employment laws as guidance. *See, e.g., Hawkins Const. Co.,* 210 NLRB 965, 968 (1974)(where claim alleged racial discrimination, Board guided by Title VII cases). In addition, the nature of the workplace looks considerably different today than when the Taft-Hartley Amendments were passed in 1947.[5] Accordingly, if necessary, the Board may adjust its policies to accommodate the

[5] Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers,* 27 Berkeley J. Emp. & Lab. La. 153 (2003).

changing individual workplace. *J.R. Flooring, Inc., d/b/a Picini Flooring*, 2010 NLRB LEXIS 429, 189 LRRM 1273 (2010). *See also NLRB v. Weingarten,* 420 U.S. 251, 266 (1975)(the Board has a duty to adopt its rules and policies to demands of changing circumstances).

In light of the above, the Board may look to analysis in other areas of employment law. In this case, the analysis of whether there has been discrimination pursuant to Title VII of the Civil Rights Act of 1964 is far more relevant to the Board's consideration than Title IX. In a broad and vague definition similar to that of the NLRA, Title VII defines an employee as "an individual employed by an employer." 42 U.S.C. § 2000 (e)(f). In a similarly circuitous fashion, the NLRA provides protection to "any employee, not limited to employees of a particular employer unless this subchapter states otherwise," then specifically excludes certain employees.[6] In contrast, Title IX provides that no *person* in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal financial assistance. 20 U.S.C. § 1681(a). An employee's gender discrimination under Title IX may also violate the prohibitions included in Title VII, but Title IX extends beyond employment. *See Emeidi v. University of Oregon*, 673 F.3d 1218 (9th Cir. 2012). Thus, while Title IX prohibits discrimination, it does so in the context of education, athletic and other activities, as well as in the employment context. Here, because of the similarity of the definition of "employee" in the NLRA and Title VII, consideration of how employee status is determined under the Title VII discrimination provisions is of far greater relevance to the Board's task.

[6] Section 152(3) excludes agricultural laborers, employees in domestic service, employees of parent or spouse, independent contractors, supervisors or employees covered by the Railway Labor Relations Act. 29 U.S.C. § 152(3).

2. The Board Should Consider Title VII Jurisprudence in Applying the Common Law Definition of Employee.

As is true with the NLRB, most courts faced with the determination of whether an individual is an employee for Title VII purposes use the common law right to control test. *See. e.g., Salamon v. Our Lady of Victory Hosp.,* 514 F.3d 217; *U.S. v. City of New York*, 359 F.3d 83 (2d Cir. 2004)(individuals required to work to obtain welfare payments are entitled to Title VII protections against sexual and racial harassment). *See also Worth v. Tyler*, 276 F.3d 249, 263 (7th Cir. 2001), *Baker v. McNeil Islands Correction Center,* 859 F.2d 124 (9th Cir. 1988)(considering whether prisoner may also be an employee for purposes of Title VII), *Cobb v. Sun Papers, Inc.,* 673 F.2d 337, 340-41, *cert. denied* 460 U.S. 1101 (11th Cir. 1982). In applying the common law test, the Sixth Circuit reasoned that the Supreme Court had instructed this approach. *Bryson v. Middlefield Volunteer Fire Department, Inc.,* 656 F.3d 348, 352 (6th Cir. 2011), *citing Darden*, 503 U.S. at 322-24, *Community for Creative Non-Violence,* 490 U.S. 730. Accordingly, in the Title VII context, courts examine the entire relationship between employer and employee, looking at the potential employer's right to control, to determine whether an individual is an employee entitled to the protections of Title VII. *See, e.g., Kemether*, 1999 U.S. Dist. LEXIS, *Sweiger*, 207 F.3d at 487, *Cuddeback v. Florida Board of Education, University of South Florida Board of Trustees,* 381 F.3d 1230 (11th Cir. 2004)(graduate student who performed work for completion of dissertation still an employee for purposes of the Title VII prohibition on discrimination), *Stewart v. Morgan State Univ.,* 2013 U.S. Dist. LEXIS 14627 at * 8 (D.C. Md. 2013).

Moreover**,** the common law agency test has been applied by the Court in other employment contexts as well, such as the ADA, *Clackmas Gastroenterology Assoc. P.C. v. Wells,* 538 U.S. 440, 444-45 (2003), and ERISA. *Darden*, 503 U.S. at 326.

Courts have also applied the common law agency test to claims filed under USSERA. *See, e.g., Evans v. Massmutual Fin. Grp.,* 856 F. Supp. 2d 606 (W.D.N.Y. 2012). Accordingly, the Board can also look to these other sources to consider its test for whether an individual is an employee under the Act. Using court analysis under other employment statues as well as its own precedent, the Board should apply the common law test of agency.

3. The Discrimination Provisions of Title IX do not Affect the Board's Analysis.

The Employer argues that the Regional Director failed to consider Title IX ramifications to coverage of the grant-in-aid scholarship recipients (Respondent's Request to Review, at 44). It may be true that the Employer has to extend certain benefits won at the bargaining table to other student athletes pursuant to the requirements of Title IX. Yet that does not change the Board's analysis; rather, it may affect the Employer's bargaining proposals and agreements made during collective bargaining. As discussed, *supra,* the Board should not consider the difficulty of bargaining or what CAPA may ultimately accomplish in reaching its decision. The Board's only decision is whether to provide the protections of the Act to a group of student employees who bring in substantial revenue to the University.

C. The Lack of Precedent Concerning Employee Status of "grant-in-aid scholarship players" Should not Affect the Board's Analysis. The Board, can, however, turn to guidance issued by the courts in analogous cases.

The fact that the Board may be considering the employee status of grant-in-aid as a matter of first impression should not affect its determination. The Board regularly faces cases of first impression, and certainly has decided cases of first impression regarding whether particular individuals are "employees" under the Act. *See, e.g., AmeriHealth Inc.*, 329 NLRB 870 (1999)(Board applied common law test to case of first impression involving

physicians performing work for HMO), *Brown & Sharpe Mfg. Co*., 87 NLRB 1031 (1949)(professional employees are employees protected by the Act).

While courts may not have considered grant-in-aid scholarship recipients, they have considered other academic relationships using the common law test for employee status. For instance, courts have found certain graduate students to be employees for purposes of Title VII. *See, e.g., Ivan v. Kent State Univ.*, 863 F. Supp. 581, 585-86 (N.D. Ohio 1994). In fact, in direct contrast to *Brown,* the Eleventh Circuit Court of Appeals found that based on the relationship between a graduate student dependent on the work for her University, and *despite* the fact that much of her work was performed for the purpose of completing her dissertation, a graduate student was an employee pursuant to Title VII. *Cuddeback,* 81 F.3d 1230. *See also Nigro v. Va. Com. Univ./Med. Coll. Of Virginia,* 492 Fed. Appx. 347 (4th Cir. 2012)(graduate student may also be employee for Title VII purposes), *Stewart v. Morgan State Univ.,* 2013 U.S. Dist. LEXIS 14627 at * 8 (D.C. Md. 2013).

III. Pursuant to the Common Law Test, the Board Must Find that the Scholarship-in-aid Football Players are Employees under the Act.

Applying the common law definition of employee, and looking at the entire relationship between grant-in-aid scholarship players and the University, the Board should find that the football players are employees under the Act. Indeed they receive compensation in the form of their scholarship, fees, and stipends, in exchange for training, participating in games, and abiding by a restrictive set of rules and policies set by the football program. (Decision and Direction at 14-17). Injury is the only exception to continuing to receive the compensation while not providing the agreed upon services. *Id.* at 15-16. The players' schedules are set by the University, they have no control over their duties or training, they agree to make an extensive time commitment to the program, and

indeed sign an agreement as to the terms and conditions of their participation in the football program. The players are financially dependent on the University as they are forbidden from seeking outside income. *Id.* The players' services are completely under the control of their coaches. *Id.* at 15.

As discussed above, one factor alone does not require a finding that an individual is not an employee. Accordingly, the fact that the IRS does not consider the players' compensation to be taxable income is not determinative. *See Seattle Opera*, 292 F.3d at 764 n.8, *Aponte v. City of Buffalo,* 2009 U.S. Dist. LEXIS 57120, at *6-7 (W.D.N.Y. 2009)(tax treatment of hired party only one factor of many to be considered, not determinative in Title VII context). An examination of the relationship in this case suggests that the football players are under the control of the football program, and are "employees" under the Act.

IV. The Board should Overrule *Brown University.*

A. The Board Should Not Apply a Special Test for Employee in the Educational Setting.

Both the Board in *Brown,* and the Employer in this case, rely heavily upon the idea that academic institutions differ from the other industries governed by the Board, and that the common law concepts simply do not apply in higher education. *Brown*, 342 NLRB at 486-493, Employer's Petition for Review, at 19, *citing Yeshiva,* 444 U.S. at 680-81(blind application of the NLRA is inappropriate in the educational setting). First and foremost, for the reasons set forth above, the Board should not distinguish between industries, but rather apply the common law definition of employee.

The Board provides protection to employees in a myriad of different industries that operate on very different models. Yet the common law agency test can be applied to determine whether individuals working in those industries are employees under the Act.

See Lancaster Symphony Orchestra, 357 NLRB No. 152 (musicians at symphony orchestra), *Roadway Package*, 326 NLRB 842 (pick-up and delivery drivers), *Boston Medical* Center, at 159-60 (medical residents and interns). Carving out a special set of rules for education is a slippery slope to creation of unnecessary disparate treatment under the Act. Far more simple, and based on precedent, is to apply the common law test and examine the nature of the particular working relationship rather than the industry involved. *See BKN, Inc.,* 333 NLRB 143, 144 (2001) (Board considers all incidents of employment in applying common law test). *Seattle Opera*, 292 F.3d at 761-62, *Roadway Package,* 326 NLRB at 843-45, *Royal Palm Dinner Theatre*, 275 NLRB at 682. Just as the Board should not make assumptions and "blindly" apply the Act in the educational setting, nor should it do the opposite, and decline coverage to individuals working under the control of another who deserve the protections of the Act.

B. The Board's Analysis in *Brown* was Flawed, Not Supported by the Statutory Language of the NLRA, and departed from precedent.

The Board should overrule *Brown University.*[7] The majority in Brown placed great emphasis on its interpretation that the relationship between the graduate students and the University was an educational one, and *not* an economic one. 342 NLRB at 489. A central flaw in this analysis is that the Board is entrusted to interpret the statutory language of the NLRA, and the statute only provides limited exceptions to coverage. No such articulated exemption exists for occupations with the dual relationship of student and employee. Unless statutorily exempt, employees are covered by Act. *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883 (1984).

[7] *Brown University and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO,* 342 NLRB 483 (2004).

The Board should overrule *Brown* to correct the inaccurate creation of a non-statutory exemption from coverage under the Act. In concluding that the relationship between graduate students and the university is primarily educational and not economic, the *Brown* Board relied heavily upon *WBAI Pacifica. See Brown,* 342 NLRB 483, *WBAI Pacifica*, 328 NLRB No. 179. Subsequently, the Board once more inappropriately relied upon *WBAI Pacifica* in denying bargaining rights to disabled individuals, claiming that the relationship was rehabilitative, not economic. *See Brevard Achievement Center,* 342 NLRB 982 (2004). *But see Goodwill Industries*, 350 NLRB 32, 38-40 (2007)(disabled individuals employees under the Act).

The problem with the Board's reliance on *WBAI Pacifica* is that the case involved unpaid volunteers, who thus had *no* economic relationship with the employer, in contrast to the students in *Brown.* 328 NLRB 1273. In *WBAI Pacifica*, the Board acknowledged that the reach of Section 2(3) is broad. *Id.* at 1274. In discussing this breadth, the Board found that "in each case where the Court found statutory employee status, there was at least a rudimentary economic relationship, actual or anticipated, between employee and employer." *Id.* (citations omitted). Thus, relying on dictionary definitions, the Board found that employment requires some form of compensation for labor or services. *Id.* Following the logic of *WBAI*, then, graduate students, and grant-in-aid scholarship football players, who provide services to the University for which they receive some form of compensation are thus employees.

Another vital flaw in the *Brown* analysis is that the teaching and research done by graduate students is in fact an occupation for which the employees receive compensation. Indeed, the Bureau of Labor Statistics classifies Graduate Teaching Assistants as an

occupation, with a mean annual wage in 2013 of $31,820.[8] The Bureau of Labor Statistics, a Department of the United States Department of Labor, describes the occupation of graduate students as "assist[ing] faculty or other instructional staff in postsecondary institutes by performing teaching or teaching-related duties, such as teaching lower level courses, developing teaching materials, preparing and giving examinations, and grading examinations or papers."[9] *See also Cuddeback*, 381 F.3d at 1230 (despite fact that much of work was towards completing dissertation, graduate student an employee for Title VII purposes).

Last, the *Brown* decision was incorrectly decided because at the time of, and in fact, previous to, the decision in *Brown*, the realities of teaching at, and the administration of, America's Colleges and Universities had begun changing dramatically, including the nature of the relationship between graduate students and the University. *See New York University,* 332 NLRB 1205 (2000).[10] Indeed, as stated by the dissent in *Brown University*, minimizing the economic relationship between graduate students and the university is unsound. *Brown,* 242 NLRB at 497 (Liebman, Walsh, dissenting). In addition to being a place of learning, today's academia is also a workplace for many graduate students, who are subject to an array of working conditions. As the dissent in *Brown* described, there had been a great increase in courses taught solely by graduate students, and the graduate students working in challenging work environments lacked the power to improve their conditions. *Id.*[11] *See also* Risa Lieberwitz*, Faculty in the Corporate University: Professional Identity, Law*

[8] www.bls.gov/oes/current/oese25119.htm
[9] *Id.*
[10] Overuled by *Brown.*
[11] *Citing* Daniel J. Julius & Patricia J. Gumport, *Graduate Student Unionization:Catalysts and Consequences*, 26 Review of Higher Educ. No. 2, 187 at 191, 196 (2002), Ana Maria Cox,

and Collective Action, 16 Cornell J.L. & Pub. Policy 263, 264 (2007)(citing rise in use by Universities of adjuncts and graduate students to teach undergraduate courses while cutting back on faculty tenure lines).

These changes have simply accelerated since the decision in *Brown*. The changes seen in universities and the role of graduate students continue to place graduate students in the precarious position of working more and more hours, in a manner similar to full faculty, yet in poorer working conditions, without any strength to affect working conditions, and without recourse. In institutions of higher learning, the percentage of instruction provided by full time tenured faculty fell from 33.1 % in 1997 to 27.3% in 2007.[12] Meanwhile, the percentage of this work performed by graduate students instead increased from 18.6% in 1997 to 20.9% in 2007. In private institutions, those coming under the jurisdiction of the Board, instruction by full time faculty fell from 34.9 % to 29.2% from 1997-2007, while graduate students saw an increase in this work from 17.9 to 21.6% from 1997 to 2007.[13] These students are increasingly doing the work of instruction and research, under at times grueling conditions. Indeed, as noted in the *The Economist* in 2010, "Universities have discovered that Ph.D. students are cheap, highly motivated, and disposable labor."[14] In the work of graduate students, "seven days a week, ten hours days, low pay and uncertain prospects are wide spread."[15]

More Professors Said to be Off Tenure Track, for Graduate Assistants, Chron. Higher Educ. (July 6, 2001).

[12] *American Academic, State of Higher Education Workforce, 1997 – 2007*, prepared by JBL Associates, Inc. for the American Federation of Teachers (Feb. 2009)(data from the National Center for Education Statistics within the United States Department of Education).

[13] *Id.*

[14] *The Disposable Academic*, The Economist (December 16, 2010).

[15] *Id.*

For all these reasons, the Board should overrule the decision set forth in *Brown University.* In the alternative, if the Board does not overrule *Brown,* it should find that *Brown* does not apply to this case for the reasons set forth in the Regional Director's Decision and Direction of Election.

V. Any Policy Concerns weigh in Favor of Upholding the Regional Director's Decision and Direction of Election.

The Employer raises a number of so-called policy concerns, some of which are discussed elsewhere in this brief. As an initial matter, however, what is important for the purposes of the Board, is not the effect of its decision on the employer, or on the industry of collegiate football, but whether it effectuates the purposes of the Act. The NLRA was enacted to address the inequality of bargaining power, to mitigate obstructions to the free flow of commerce by promoting collective bargaining, and the protection of the rights of workers "of full freedom of association, self-organization, and designation of representatives of their choosing, for the purposes of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151. Given the disparity of bargaining power between the players and the University, the disputes arising from that inequality, and the demanding conditions in which players work, it effectuates the purposes of the Act to find grant-in-aid scholarship recipients to be employees under the Act.

The Employer argues that coverage under the Act would create chaos because of the implications of its being the only private "big ten school", subject to a variety of state and federal rules. As discussed below, many employees are subject to a number of restraints, and this does not negate the bargaining obligation.

The Employer also argues that NLRA jurisdiction over the grant-in-aid scholarship players may subject them to tax ramifications. Most importantly, tax treatment is only one factor to be considered by the Board, and does not resolve whether an individual is an employee under the Act. *See, e.g, The News-Journal Company,* 180 NLRB 864, 867 (1970). In addition, IRS regulations address qualified scholarship without reference to the word "employee," and is not bound by any findings of the Board. *See* IRC §§ 117(a), (b)(1), (c)(1).

VI. The Existence of Outside Constraints on Bargaining Does Not Alter a Party's Right to Bargain, and Should not be Considered by the Board.

The Board questions to what extent it should consider external constraints on bargaining that may affect a party's ability to bargain. Northwestern complains that it will face constraints in the collective bargaining process, and accordingly, should not be compelled to do so. Yet, in fact, all employers are constrained to some extent in bargaining, as various federal and state laws set a particular floor for wages or other working conditions below which the parties may not fall.

A common constraint in setting terms and conditions of employment exists when private contractors perform work for a government entity. Many government contractors are subject to exacting oversight in the form of statutes, responsibilities and agreements, yet the Board routinely asserts jurisdiction. *Chicago Mathematics & Science Academy Charter School*, 359 NLRB No. 41, 2012 NLRB LEXIS 843 (2012). While the parties may be left with less to bargain over than otherwise may be the case, this does not negate their obligation to bargain. *See Mgmt Training Corp.*, 317 NLRB 1355 (1995)(many non economic matters to bargain over even if the parties are subject to regulations concerning wages).

In fact, all employers are constrained in the wages they can bargain for, and by the rates they must pay for overtime work by the Federal Labor Standards Act. 29 U.S.C. §§ 201, 206, *et. seq.* Illinois law places a higher floor on employers than the federal government, currently requiring a minimum wage of $8.25, 820 ILCS 105/1-15, requiring One Day Rest in Seven, 820 ILCS 140/1-9, prevailing wages on state funded construction projects, 820 ILCS 130/01-12, and certain health and safety requirements. 820 ILCS 225/01-25. Employers in a myriad of industries face a host of regulations of the workplace, be it in regulation of the workforce in schools, 105 ILCS 5-21 (teacher certification), 105 ILCS 5-24 (duties of teachers), in cemeteries, 225 ILCS 411/5-1, or in the trucking/transportation industry. *See e.g.,* 49 C.F.R. Part 395.3 (maximum driving times for property carrying vehicles), 49 C.F.R. Part 395.5 (maximum driving times for passenger carrying vehicles). Yet parties in these industries, education, funeral and cemetery work, and truck driving, commonly have collective bargaining agreements. Regulations often exist that may restrict the terms of the parties' agreement, but this does not negate a party's right to bargain. *See Mgmt Training Corp.,* 317 NLRB 1355, *First Line Transportation,* 347 NLRB 447 (2006).

The potential situation faced by the Employer is no different than in these other industries. While it faces certain requirements pursuant to Title IX, and NCAA rules and policies, employers in other industries face a myriad of federal and state law requirements to which they must adhere. Outside constraints simply do not affect the Board's determination.

VII. The Board Should not Recognize Grant-In-Aid Scholarships athletes as Employees but then Preclude them from Bargaining under the Act.

Last, the Board questions whether it should recognize grant-in-aid scholarship athletes as employees but preclude them from bargaining. Such resolution conflicts with the purposes of the Act, to allow concerted activity and bargaining for improvements in working conditions. *See* 29 U.S.C. § 157.

The Board has created the extremely limited policy to consider "confidential employees" to be employees pursuant to the Act, eligible for the protections of the Act, but excluded from collective bargaining units. *See Erica, Inc.*, 344 NLRB 799 (2005), *Bakersfield California,* 316 NLRB 1211 (1995). *See also NLRB v. Hendricks County Rural Elec. Member Corp.,* 454 U.S. 170 (1981). The policy is limited to employees who have access to confidential information affecting the unit as the assistant to a manager who formulates, determines, and effectuates an employer's labor relations' policy. *See Bakersfield*, 316 NLRB 1211, *Reymond Baking Co.,* 249 NLRB 1100 (1980). This allows managers who control labor policy to adequately perform their role without concern that a unit member has access employer plans, strategies, and other confidential information. *Id.*

An important aspect of the Supreme Court's ruling in *Hendricks,* which upheld the Board's "labor nexus" test used to determine whether an employee is a "confidential employee" under the Act, is its interpretation of Congressional intent. Specifically, the Court found that in passing the Taft-Hartley amendments of 1947, Congress intended to exclude only those employees who work in a confidential capacity with those managers who are involved in labor relations, personnel and employment functions. 454 U.S. at 228-230. The Court was interpreting Congressional intent voiced during a discussion of the exclusion of supervisors from coverage under the Act. There is no suggested exclusion that

applies here. Nor is there any stated policy concern that justifies denying bargaining rights to any other employees covered by the Act. Accordingly, the Board should not create any new category of employee with rights under the Act, but exclude them from bargaining units or the ability to engage in collective bargaining.

CONCLUSION

For the reasons stated above, *Amicus Curie* respectfully requests that the Board uphold the Decision and Direction in its Entirety, Overule *Brown*, and find that the common law agency test is the appropriate standard in determining employee status under the Act.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2014, I caused the foregoing to served on the following *via the NLRB website e-filing system*. In addition, I hereby certify that I served the following either via e-mail or U.S. First Class Mail, proper postage prepaid:

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